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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1217

RAY S. BAILEY, *Petitioner*

v.

ELLIS MACDOUGALL, Director of The Department of Corrections for the State of South Carolina, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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ELLIS MACDOUGALL, Director of The Department of Corrections for the State of South Carolina, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Petitioner, Ray S. Bailey, prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court, discharging a writ of habeas corpus and remanding petitioner to custody for service of a life sentence, entered on November 10, 1965, rehearing denied and remittitur sent down, December 14, 1965.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court, as yet unreported in the State reports but reported at 145 S.E. 2d 425 (1965), is appended (App. pp. 1a-13a). The petition for rehearing and order of denial without opinion is printed in Appendix hereto (App. pp. 14a-18a).

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on November 10, 1965, rehearing denied and remittitur sent down on December 14, 1965 (App. p. 18a). The jurisdiction of this Court is invoked under Title 28, U.S. Code, section 1257(3). By order of March 11, 1966, the time for filing this petition was enlarged to April 14, 1966.

QUESTIONS PRESENTED

(1) Whether a conviction upon a guilty plea negotiated by the prosecutor with full knowledge that he had insufficient evidence to secure a conviction if the accused was brought to trial, without disclosure of that fact to either the Court or defense counsel, is such a violation of due process under the Fourteenth Amendment as to entitle the accused to release from custody?

(2) Whether the Court's acceptance of a plea of guilty to a capital offense can stand where the Court did not require the prosecutor to disclose the State's evidence and failed to exercise the basic due process requirements of ascertaining if the accused was entering the plea freely and deliberately with full knowledge of the nature and consequences of the plea?

(3) Whether a written agreement signed by the prosecutor and Chief of Police to recommend a pardon

or parole after the accused had served a period not exceeding ten years was an implied promise of leniency which destroyed the voluntary nature of his guilty plea?

STATEMENT

Petitioner, Ray S. Bailey, was indicted August 25, 1932, on a charge of murder in the Greenville County Court of General Sessions and tried in January, 1936, having been extradicted to the State of South Carolina from the State of North Carolina pursuant to the decision of this Court in *State of South Carolina* v. *Ray Bailey,* 289 U.S. 412, (1933). Petitioner changed his plea to guilty of murder with recommendation to the mercy of the Court, following the negotiation of an agreement, which was reduced to writing (App. p. 19a), between the then prosecutor, the Chief of Police and petitioner's attorney, the agreement being that the prosecutor and Chief of Police would recommend a pardon or parole after the petitioner had served a period not exceeding ten years. Neither the fact nor the contents of the agreement was disclosed to the Court, and the petitioner was sentenced to be confined for a term of his whole natural life.

On May 4, 1964, the petitioner, through counsel, filed a petition for a Writ of Habeas Corpus in the Court of Common Pleas for Richland County, alleging that his restraint under the above sentence was unlawful and in violation of his constitutional rights under both the State and Federal Constitutions, asserting among other things a denial of due process of law and that his guilty plea was induced by a promise that he would serve only ten years or possibly less of the sentence. The Honorable John Grimball, Judge, Fifth

Judicial Circuit, issued the Writ of Habeas Corpus, and hearings were held.

Defense counsel for petitioner at the time of his trial and the prosecutor, Mr. J. G. Leatherwood, solicitor for the Thirteenth Judicial Circuit in 1936, offered testimony in the habeas corpus proceeding stating that they entered into negotiation concerning a possible guilty plea, that the prosecutor did not personally confer with the petitioner, and that the written agreement was presented to him by his attorney.

The prosecutor testified that he initiated the negotiations to get the petitioner to plead guilty (TR-87) because the irregularities in the attempted arrest, coupled with the refusal of the principal witness for the State to testify, made the possibility of getting conviction extremely remote (TR-85-86, 92-93). He further testified that the facts of the deficiency of the State's case were not known to petitioner's attorney (TR-86, 100) during the negotiations for the plea, or to the Court at the time the plea was entered (TR-89).

By Order of July 29, 1964, Judge Grimball set aside the guilty plea and sentence on the grounds that it was induced by the promise with respect to the sentence, and remanded the case to Greenville County for a new trial. The petitioner was released from custody after posting bond. The State appealed to the Supreme Court of South Carolina.

The Supreme Court of South Carolina reversed and remanded, discharging the Writ of Habeas Corpus on November 10, 1965, — S.C. —, 145 S.E. 2d 425 (1965). Petition for rehearing was filed on November 18, 1965, to focus the attention of the Court on the question of non-disclosure by the prosecutor, but rehearing was denied without opinion on December 14, 1965.

REASONS FOR GRANTING THE WRIT

I.

Constitutional Due Process Cannot Be Satisfied Where the Prosecution Negotiates a Guilty Plea Knowing It Has No Other Means To Obtain a Conviction and Fails To Disclose This Fact to Either the Defendant's Counsel or the Court

The obligation of the prosecutor in a criminal case is clearly set forth by Justice Sutherland, speaking for this Court in *Berger* v. *United States,* 295 U.S. 78, 88 (1935) in these words:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

While the Berger Case refers to a United States Attorney, clearly the same obligation would apply to a State Prosecutor. See Canon Five of the American Bar Association Canons of Professional Ethics which states, "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

This Court has held in two cases, *Wilde* v. *Wyoming,* 362 U.S. 607 (1960), *Pyle* v. *Kansas,* 317 U.S. 213

(1942), and stated in a third, *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935), that when the petitioner has alleged *inter alia*, suppression of evidence through intimidation of witnesses by the prosecution that relief may be granted on a petition for habeas corpus.

What non disclosure by a prosecutor violates due process is set forth in *Mooney* v. *Holohan, supra,* in these words:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demand of justice as is the obtaining of a like result by intimidation."

The rule was broadened in *Pyle* v. *Kansas, supra,* where this Court said:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by these same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and if proven, would entitled petitioner to release from his present custody."

Two other cases, both from the Third Circuit, *United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815 (3rd Cir. 1952), cert. den. 345 U.S. 904 (1953), and *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763 (3rd Cir. 1955), reh. den. May 23, 1955, have set aside convic-

tions on the ground that failure to disclose the existence of exculpatory evidence violated the due process clause and the Court did not indicate a difference between active suppression and passive non-disclosure in these cases, but in the *Baldi Case* construed the statement in *Pyle* v. *Kansas, supra,* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process.

Other Federal Courts have struck down convictions on the ground that the prosecutor failed to disclose exculpatory evidence when an examination of the trial record showed that the defendant was prejudiced without reference to the due process requirement. See *United States ex rel. Montgomery* v. *Ragen,* 86 F. Supp. 382 (N.D. Ill. 1949). What more prejudice need be shown than twenty-eight years of confinement?

This Court in *Napue* v. *Illinois,* 360 U.S. 264 (1959), has extended the test formulated in *Mooney* v. *Holohan, supra,* by saying: "It is established that a conviction obtained through the use of false evidence known to be such by the representatives of the State must fall under the Fourteenth Amendment." And further in the same case: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." See *Alcorta* v. *Texas,* 355 U.S. 28 (1957).

This area of the law was further strengthened by the decision of this Court in *Brady* v. *Maryland,* 373 U.S. 83 (1963), when this Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punish-

ment, irrespective of the good or bad faith of the prosecution."

And the most recent case of *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir. 1964) extends the due process safeguard and distinguishes the Brady decision on the point of the request by counsel for the evidence suppressed. In the *Barbee Case,* the Court said:

> "In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel .... 'The cruelest lies are often told in silence.'
>
> The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but, if he too is the victim of police suppression of the material information, the state's failure is not on that account excused."

This Court said in *Rochin* v. *California,* 342 U.S. 165 (1952), that "due process of law, as a historic and generative principle precludes defining and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice'."

Surely, nothing can be more offensive to the sense of justice than the conduct of the prosecution in the instant case where the objective of a conviction for the State was to be achieved at any price, even to bargaining for a guilty plea with an agreement which the presecution knew to be unenforcible against the State in exchange for a conviction which otherwise could not be obtained. By every standard of fair play, this was a violation of due process.

II.

It Is the Duty of the Court To Exercise the Basic Due Process Requirement of Ascertaining the Voluntary Character of a Guilty Plea to a Capital Offense and To Advise the Accused as to the Consequences of the Plea.

The fundamental right of an accused to be informed of the crime with which he is charged has been regarded as including the right to be informed of the consequences of a conviction thereon.

A plea of guilty in a capital case should be accepted cautiously and not until after the accused has been fully advised by the Court of his rights and the consequences of his plea and the court has been satisfied that the accused has acted voluntarily and with full knowledge, appreciation and understanding of the nature and consequences of the plea. The fact that the accused is represented by counsel at the time he offers a plea of guilty does not relieve the court of its duty to him. State cases are collected in the annotation in 97 ALR 2d 552 on the subject of the court's duty to advise or admonish an accused as to the consequences of a guilty plea.

Rule 11 of the Federal Rules of Criminal Procedure provides that the court may refuse to accept a plea of guilty, and "shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge". This rule, although not expressly including the "consequences" of a plea of guilty as a specific category to which the accused's knowledge must extend, has been regarded as confirmatory of the proposition, previously recognized, approved, and applied in the federal courts, that an accused can make a valid plea of guilty only with the knowledge and appreciation of its consequences. Also

where it does not appear that an accused who offers a plea of guilty possesses such knowledge and appreciation, it is the duty of the court to see that he has it, before accepting the plea.

Although the State courts are not bound by the Federal Rules, they are bound by the requirements of due process and it is submitted that those rules are simply expressive of the policy of the law in the absence of such expressed requirements. The record before this Court clearly shows that the Trial Judge had no knowledge of the arrangements made between the prosecutor and the accusd in exchange for the plea of guilty[1] and that he made no attempt to inform himself of the circumstances of the plea or to admonish the accused concerning the consequences of the plea (TR. 46-47). In fact, the accused, at that time a young man of 26 years, did not in fact speak in the courtroom except to give his age.

The very early cases emphasized what is settled by modern decisions, and in some States by statute, that a court should never accept a plea of guilty, especially in a capital case, without exercising caution and being satisfied *by evidence* that the confession is made by the accused freely and deliberately, and with full and per-

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[1] Plea bargaining is an accepted practice in federal criminal trials subject to court supervision and approval. Federal Rules of Criminal Procedure, Rule 11; *Shelton* v. *United States*, 246 F. 2d 571 (5th Cir. 1957). However, the same practice in the State of South Carolina is for the most part entirely without the ambit of judicial supervision. It is a matter almost entirely within the hands of the prosecutor who determines what plea will be accepted and under what conditions; a system obviously open to abuse of defendant's rights and violative of due process requirements of judicial supervision of this important phase of administration of criminal justice.

fect knowledge of the nature and consequences of the confession; otherwise the plea should not be received.[2] It is the constitutional right of everyone accused of crime to a trial by jury and although this is a right which may be waived, the accused is not bound by his confession, except when it has been made deliberately and under the deepest solemnities. Examples of early precedent and case authority in this connection are found in 1 Greenleaf Evidence, 15th Ed., Sec. 216; 1 Chitty, Criminal Law (1847) 428; 2 Bishop New Crim. Proc., 2d Ed. Sec. 795, p. 619. An excellent discussion of this phase of criminal justice is found in *State* v. *Johnson,* 21 Okla. 40, 96 Pac. 26 (1908).

There is not now nor was there at the time of petitioner's trial any statutory requirement or court rule in South Carolina requiring the accused to be accorded the basic due process requirement of being advised by the court as to the nature and consequences of his plea, but, as stated by the court in the *Johnson Case:*

> We have no such statute to control the discretion of the Courts in this state, but the authorities above cited are sufficient to indicate the policy of the law in the absence of such direct requirements.

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[2] The voluntary nature of the guilty plea in this case was destroyed by the fact and content of the written agreement by the prosecutor and Chief of Police to recommend parole for petitioner within ten years. At the time this agreement was made a recommendation to parole by a prosecutor to the Governor was tantamount to an accomplished fact of parole. However, by the time petitioner was due for consideration under terms of the agreement the probation and parole system for the State had been drastically changed, placing the parole function in the hands of a Parole Board with broad discretionary powers. The record indicates petitioner believed the written agreement was a guarantee of freedom within ten years or less. Therefore, the agreement was the motivating cause for the plea and was a subverting factor so that the choice was not clearly and freely responsible. *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948).

Even in the absence of a statutory duty on the Court to ascertain the voluntary character of a guilty plea the basic requirements of due process demand the court provide this protection to the criminally accused. This requirement has a deep rooted place in our history that can be traced back to our English heritage. See Blackstone, Commentaries at page 329 and Bowyer, Commentaries on the Constitutional Law of England (1846) at page 355.

SUMMARY

The record of this case clearly shows a violation of due process in several areas of the proceedings which cannot be cured by the fact that the accused was represented by counsel or dismissed as harmless error. These departures from due process go to the very heart of the fundamental fairness required in the administration of criminal justice. Foremost among these departures was the prosecutors concealment of evidence favorable to the petitioner. Counsel could not adequately or effectively represent petitioner when he was not aware of the fatal deficiency in the State's case, and could not, by his own diligence, ascertain the true situation in view of the prosecutor's conscious effort to conceal the circumstances surrounding his chief witness.

The prosecutor failed in his duty to justice and the State when he knowingly bargained for the guilty plea as his only means of obtaining a conviction and when he failed to inform the Court of the quality of the evidence available to him.

The Court failed in its judicial duty in accepting a plea of guilty to a capital offense without satisfying itself that the plea was made freely and voluntarily with full knowledge of the consequences. Having been put on notice by the plea of not guilty at the arraign-

ment, the Court was duty bound to inquire into the circumstances of the guilty plea and to require the prosecution to present the State's evidence for judicial consideration before accepting the plea. Had the Court carried out its duties in this respect it would have discovered the petitioner honestly believed the written agreement with the prosecutor was a guarantee of freedom within ten years or less and that he was improperly influenced in his plea by the very fact of this agreement.

These violations of the petitioner's right to a criminal trial with full observance of all the due process requirements of such a trial can only be remedied by granting him absolute release from custody after nearly thirty years of confinement.

CONCLUSION

State suppression of favorable evidence from a criminal defendant, connected with a plea bargaining process not judicially supervised, and the indifferent and pro forma acceptance of a thoroughly suspect guilty plea by a trial court falls far short of the constitutional requirements of due process. The establishment of uniform requirements of due process in this connection to insure proper administration of criminal justice in State criminal trials warrants definitive action by this Court.

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APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RAY S. BAILEY, *Respondent,*

v.

ELLIS MACDOUGALL, Director of the Department of Corrections for The State of South Carolina, *Appellant.*

Appeal From Richland County
John Grimball, Judge

Opinion No. 18420
Filed November 10, 1965

REVERSED

Attorney General Daniel R. McLeod and Assistant Attorney General Edward B. Latimer, both of Columbia; and Solicitor B. O. Thomason, Jr., of Greenville, for appellant.

Mrs. Betty McBride Sloan, of Columbia, for respondent.

Moss, A. J.: This record shows that on May 1, 1932, A. B. Hunt, a police officer of the City of Greenville, South Carolina, was shot and killed on a well lighted street in said city while he was attempting to prevent a robbery. Thereafter, on May 5, 1932, a warrant was issued by a Magistrate of Greenville County charging Ray Bailey, the respondent herein, with the murder of said Hunt. The Governor of South Carolina duly made requisition upon the Governor of North Carolina and, on May 9, 1932, the Governor of North Carolina duly issued a warrant of extradition requiring the arrest of Bailey. He was arrested on June 7, 1932, and thereafter applied to the Superior Court of Jackson County, North Carolina, for a Writ of Habeas Corpus alleging the illegality of custody in that he

was charged with the murder of A. B. Hunt on May 1, 1932, when, at which time he was in the State of North Carolina and was not in the State of South Carolina. A return to the writ was duly made asserting that Bailey was lawfully in custody upon the aforesaid warrant. The case came on to be heard before a Judge of the Superior Court of North Carolina and, after hearing numerous witnesses and receiving a number of affidavits, the trial judge found that Bailey was not a fugitive from justice from the State of South Carolina and was not present at the time of the commission of the alleged crime at Greenville, South Carolina, and directed his release from custody. From the aforesaid judgment, an appeal was taken on behalf of the State of South Carolina to the Supreme Court of North Carolina and a writ of certiorari issued to bring up the record. The judgment of the lower Court was affirmed. Ex Parte Bailey, 203 N. C. 362, 166 S. E. 165.

The State of South Carolina applied to and was granted by the Supreme Court of the United States a writ of certiorari to review the judgment of the Supreme Court of North Carolina, which affirmed the judgment of the Superior Court of Jackson County, North Carolina. The United States Supreme Court reversed the judgment of the Supreme Court of North Carolina which had affirmed the lower Court, holding that one whose extradition is sought cannot be released from custody on habeas corpus unless his absence from the demanding State, when the alleged offense was committed, is established beyond reasonable doubt; and this requirement is not met where there is merely a conflict of evidence. The cause was remanded to the Supreme Court of North Carolina for further proceedings. South Carolina v. Bailey, 289 U.S. 412, 53 S. Ct. 667, 77 L. Ed. 1292.

Thereafter, in 1935, Bailey was arrested in Gainesville, Georgia, and brought to Greenville, South Carolina, for trial upon an indictment charging him with the murder of

A. B. Hunt; the said indictment having been returned by the Grand Jury of Greenville County on August 25, 1932.

The record shows that Bailey employed an outstanding, capable and experienced lawer of the Greenville Bar to represent him. This attorney is of the highest integrity and honesty and always gives a client his complete loyalty and serves him in good faith to the best of his ability.

The case against the respondent was called for trial in the General Sessions Court for Greenville County on January 13, 1936. Upon his arraignment, the respondent entered a plea of not guilty. Thereafter, the Solicitor and the retained counsel of the respondent entered into negotiations concerning a possible guilty plea. Pursuant thereto it was agreed that the respondent would withdraw his plea of not guilty and enter a plea of guilty of murder with recommendation to the mercy of the Court. A jury was impaneled and the agreement which had been reached was carried into effect by the verdict of said jury. The respondent was sentenced to imprisonment in the State Penitentiary for the term of his whole lifetime.

It appears from the record that during the negotiations concerning a possible guilty plea that the Solicitor and the Chief of Police of the City of Greenville signed a statement, dated January 13, 1936, and such was delivered to counsel for the respondent, reading as follows:

> "This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County, that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole."

The respondent with the aid of retained counsel, other than his original counsel, on May 4, 1964, petitioned the Court of Common Pleas for Richland County for a writ of *habeas corpus*, alleging that his detention and restraint under the aforesaid sentence was unlawful and in violation of his constitutional rights under both the State and Federal Constitutions, asserting (a) denial of due process of law; (b) that his guilty plea was induced by the written promise and agreement hereinbefore set forth, that if he would plead guilty he would only serve ten years and possibly less, and would be aided in securing a parole; (c) that being only twenty-five years of age, with no previous record and no experience with the law, signed the agreement believing and being led to believe that the State was bound by the aforesaid agreement; and (d) that the voluntary nature of his guilty plea was destroyed by the acts herein recited, thereby depriving him of his rights guaranteed by Art. I, Sec. 5 and Sec. 18 of the 1895 Constitution of this State, and of the Fifth and Fourteenth Amendments to the Constitution of the United States. The State, by way of return to the aforesaid petition, alleged that the respondent was confined in the South Carolina State Penitentiary pursuant to a sentence of life imprisonment imposed upon him on January 13, 1936, in the Court of General Sessions for Greenville County, South Carolina, which followed a plea of guilty to the charge of murder with recommendation to the mercy of the Court. The other allegations of the petition were denied.

A full hearing on the issue made by the respondent's petition and the return of the State was had before the Honorable John Grimball, Resident Judge of the Fifth Judicial Circuit. Thereafter, by order of July 29, 1964, Judge Grimball set aside the guilty plea and the sentence imposed pursuant thereto on the grounds that the respondent's guilty plea was induced by the agreement heretofore set out, that he understood that he would only serve ten years and possibly less, that the Solicitor would aid in his

parole, that he was led to believe that the State was bound by the Solicitor's actions, and that these acts destroyed the voluntary nature of the guilty plea. The trial Judge further held that the respondent was not entitled to his absolute release and remanded this case to the General Sessions Court for a new trial. He permitted the respondent to be released from custody provided he posted a bond in the amount of Ten Thousand Dollars, to be approved by the Clerk of the Court of Greenville County. The State has appealed from the aforesaid order.

The issue here is whether the agreement by the Solicitor and the Chief of Police to recommend to the Board of Pardons or Governor a pardon or parole after the respondent had served for a period of not exceeding ten years destroyed the voluntary nature of his guilty plea.

The person seeking relief by a writ of *habeas corpus* has the burden of sustaining the allegations of his petition by a preponderance of the evidence. Shelton v. State, 239 S. C. 535, 123 S. E. (2d) 867; Moore v. State, 241 S. C. 279, 128 S. E. (2d) 109.

The respondent testified that he was not guilty of the crime charged against him in the indictment and that he wasn't in Greenville, South Carolina, at the time the alleged crime was committed. The question of the guilt or innocence of the respondent is not an issue in a *habeas corpus* proceeding. Medlock v. Spearman, 185 S. C. 296, 194 S. E. 21; Wyatt v. State, 243 S. C. 201, 133 S. E. (2d) 120, and Tillman v. State, 244 S. C. 259, 136 S. E. (2d) 300. Likewise, *habeas corpus* is not the proper proceeding to try the question of alibi. 39 C. J. S., Habeas Corpus, Sec. 22, page 473.

A plea of guilty is a confession of guilt made in a formal manner and is equivalent to and as binding as a conviction after a trial on the merits. It has the same effect in law as a verdict of guilty and authorizes the imposition of the

punishment prescribed by law. A plea of guilty must be freely and understandingly made. A plea of guilty, if induced by promises which deprive it of the character of a voluntary act, is void and should be set aside.

We come now to consider whether the respondent voluntarily and understandingly entered a plea of guilty to murder with a recommendation to the mercy of the Court or whether his plea was induced by promises which destroyed the voluntary character of such.

It is admitted that the respondent never had any conversation with the Solicitor or any law enforcement officer concerning the entry of his plea. According to the record before us, the only persons who discussed this matter with the respondent were his brother, C. M. Bailey, and his employed attorney. This attorney was called by the respondent as a witness. He testified that he was employed by C. M. Bailey, a brother, to represent the respondent. This attorney testified that in the preparation of the defense of the respondent, he reviewed all of the circumstances in the case as best as he knew how and realized that under the facts it would be very difficult to defend the case successfully. The record is not entirely clear as to whether counsel for the respondent or the Solicitor initiated negotiations looking toward the taking of a plea. He says that he endeavored to procure from the Solicitor and the Chief of Police an agreement to accept a plea of guilty to a charge of manslaughter rather than murder, in which effort he was unsuccessful. He said the Solicitor finally agreed that if the respondent would enter a plea of guilty to murder with a recommendation to mercy that he and the Chief of Police would recommend a pardon or parole after the respondent had served ten years. This attorney then testified as follows:

> "After they agreed that they would make that recommendation, I talked to Mr. Bailey's brother, and I went down to the jail and talked to Mr. Bailey and

his brother together, and I told them just exactly what the proposition was and what the circumstances were, and we discussed the case as a lawyer does with his client. Mr. Bailey had never admitted, and has not to this day, to me admitted directly that he was there or that he killed the officer. But I remember stating to Mr. Bailey and his brother the proposition that was to be considered, and I said 'Mr. Bailey, if you were not there and did not participate in that shooting, I would advise you under no circumstances to enter any plea of guilty of any kind'—I said, 'You are the only person who knows whether you were there or not', and I said, 'You and your brother can discuss this matter and come to a conclusion about it. If you were there and participated in it, you can consider whether or not you would agree to this plea.' "

We quote further from this attorney's testimony:

"* * * * Of course, we discussed the evidence that was against him, and at any rate, I told him to consider this matter, and I also told Mr. Bailey and his brother that this recommendation did not mean that the Governor would have to grant the parole or the pardon, but I did state to him that, ordinarily, the Governor would give great weight to the recommendation of the prosecuting officer and to the Chief of Police in this case. So, after discussing it with them, I left and told them to talk about it and let me know the next day their conclusion. So I went back down to the jail, according to my recollection, and Mr. Bailey and his brother, Mr. C. M. Bailey—I think that was his name—said they thought they would agree to enter the plea. Out of an abundance of precaution, I went back to the Solicitor, your Honor, and the Chief of Police, and told them that they would have to put that agreement in writing; that it was a very serious matter; and that, if they would write me a letter stating that they

would recommend a parole or pardon of Mr. Bailey after he had served a term of ten years or before—I forget just how it was, but you have the letter before you—that he would enter the plea. So the plea was entered under those circumstances. The letter was signed and I took it down to Mr. Bailey and let him read it, or read it to him. At least, I showed them the letter and had the agreement confirmed in that way."

This attorney was further asked by the present attorney for the respondent whether or not he felt that "this agreement itself was tantamount to the promise that this man would serve only ten years." The answer to this question was:

"Well, no, ma'am, I couldn't answer that affirmatively, because I told Mr. Bailey at the time that this letter did not mean that the Governor would have to grant the parole or the pardon, but I did tell him that the recommendation of those two officers, ordinarily, would have great weight with the Governor or anyone who passed upon that question."

This witness was asked on cross-examination as to the legality of the agreement made by the Solicitor and the Chief of Police. His answer was:

"* * * * the legality of this agreement is not in question. The agreement was that these two officers would recommend a parole or a pardon for this boy after service of ten years, and I don't know what you mean by 'legality', but that was an agreement between the two officers and the prisoner that they would do that. Now, they carried that out. They recommended that he be paroled or pardoned. They carried out the agreement. Now, as to the legality of it, I don't understand what you mean."

We quote further from the testimony of this witness:

"Q. Well, to clarify that, there was actually no coercion exerted on the part of the Solicitor against Ray Bailey, was there?

"A. Not a bit that I know of.

"Q. And any recommendations or conversations that were had concerning this agreement were made by you to Mr. Bailey, were they not?

"A. That's right.

"Q. The conversations were between you and Ray Bailey and his brother, C. M. Bailey?

"A. That's my recollection.

"Q. And the final agreement to take, or to agree to this plea of guilty to murder with recommendation to the mercy of the Court, was Ray Bailey's decision and Ray Bailey's alone, was it not?

"A. Yes, sir. He made the decision and instructed me what to do."

This witness, in several other places in his testimony, said there was no coercion or intimidation on his part to convince the respondent that he should make this guilty plea. He further said that he explained to the respondent that the agreement made by the Solicitor and the Chief of Police would only be a recommendation to the Governor and that it would be up to the Governor as to whether or not he would accept this recommendation and act on it; that he would not be bound to do so.

The Solicitor, who prosecuted this case in behalf of the State, was called as a witness by the respondent. He testified that it was his recollection that he approached counsel for the respondent with a view to having the respondent enter a plea of guilty in this case. He said that after negotiations that the respondent's attorney came back to him and said he wouldn't permit the respondent to plead unless the Solicitor and Chief of Police would sign a letter

that after the service of not more than ten years that "we would recommend that he be paroled or pardoned." The Solicitor said it was finally agreed that respondent would enter a plea of guilty with recommendation of mercy with the consent and approval of the State, and he confirms the signing by him and the Chief of Police of the letter hereinbefore quoted, that they would recommend to the Board of Pardons or Governor a pardon or parole after the respondent had served for a period not exceeding ten years. He further testified that when the respondent made application for a pardon or parole that he and the Chief of Police recommended that such be granted. The Solicitor testified that he never talked to the respondent or with any member of his family. He said that the only negotiations that he had in connection with this case were through the employed attorney of the respondent.

Ray Bailey testified in his own behalf and admitted that he escaped from custody in 1950 and went to North Carolina and voluntarily surrendered within a few days thereafter and was returned to prison. He testified that he again escaped in 1957 and was at large for approximately seven years when he was recaptured in the State of Montana and returned to prison.

The respondent testified that he agreed to take a life sentence with the understanding that he would get out in ten years or less. He said "That's the way it was explained to me." Upon cross-examination, when asked if his attorney did not come to the Greenville County Jail with his brother and "told you that he had worked out a proposition concerning a consent verdict," his answer was that he didn't remember what his lawyer said but "I remember he said he had it fixed for me to take a life sentence. That's all I remember." When asked if the Solicitor or any of his assistants ever in any way tried to coerce him into entering a plea of guilty or a consent verdict, said "I don't remember talking to them, so they

couldn't." He admitted that he had seen a copy of the letter which the Solicitor and the Chief of Police signed stating that they would agree to recommend either a parole or a pardon after he had served a maximum sentence of ten years. He admitted that the Solicitor and the Chief of Police "kept their word" and recommended a pardon or parole for him after he had served ten years. When pressed for an answer as to who told him that if he would take a life sentence that he would get out in ten years or less, he said that his brother, C. M. Bailey, was the one who made this representation to him.

The respondent called as his witness the Director of the South Carolina Pardon and Parole Board. This witness testified that the application of the respondent for a parole came before his Board. In passing upon such application, the Board considered the recommendation of the Solicitor and the Chief of Police who had on several occasions recommended the respondent for parole. This witness further testified that the prison record and his escapes hurt the respondent more than anything else.

It has been held that allegations in a petition for a writ of habeas corpus that the petitioner is held without due process of law must be specific in statement of facts supporting the legal conclusion. Kohl v. Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. Ed. 432; Whitten v. Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed 406, and Ex Parte Anderson, 191 Or. 409, 229 P. (2d) 633, 230 P. (2d) 770, 29 A. L. R. (2d) 1051.

A habeas corpus case is tried and determined on the issues framed by the pleadings. The proof must correspond with, and be confined to, the issues raised by the pleadings. A material variance between the pleadings and the proof is fatal. 39 C. J. S., Habeas Corpus, Sec. 97(a) and (b), page 661.

We recur to the petition herein in which it is alleged that the respondent's detention and restraint is unlawful and

unconstitutional in that he was denied due process of law because:

> "Petitioner's guilty plea was induced by the written promise and agreement dated January 13, 1936, of * * * *, then Solicitor of the Thirteenth Judicial Circuit, and * * * *, then Chief of Police of the City of Greenville, that if he would plead guilty as charged he would only serve ten years and possibly less, and they would aid in his parole, a copy of said agreement being attached hereto."

The petition of the respondent is specific in that it is alleged that the guilty plea was induced by the written promise and agreement of the Solicitor and the Chief of Police of the City of Greenville, that if he would plead guilty he would only serve ten years and possibly less. There is no proof of this fact in the record. The promise and agreement, a copy of which said agreement was attached to the respondent's petition, is to the contrary. The written promise made by the Solicitor and the Chief of Police is definite, clear, explicit and unambiguous. The only promise made in such letter was that if the respondent entered a plea of guilty to murder with a recommendation to mercy that these officers would "after the said Ray Bailey has served for a period of not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole." It is stipulated that the Solicitor never conferred with the respondent and that the written promise and agreement was explained to him by his employed counsel.

A study of the entire record in this case leads us to the conclusion that the respondent has failed to prove by a preponderance of the evidence that he was misled, deceived or overreached in anyway. There is nothing to show that the plea was induced by coercion, false promises or misrepresentations. The respondent's plea of guilty was freely,

voluntarily and understandingly made after full consultation with his brother and his employed counsel. The record is entirely free of any evidence that the plea of guilty entered by the respondent was induced or in any way influenced by any improper act or advice of his counsel but was entered after full disclosure to him by his counsel of its nature and possible consequences. There is a total absence of any proof that any one connected with the State, or even the respondent's own counsel, did or said anything which destroyed the voluntary character of his plea of guilty.

It is our conclusion, under all the facts and circumstances as revealed by the record in this case, that the respondent was not deprived of any rights guaranteed to him under the Constitution of the United States or of this State. We further conclude that the finding by the lower Court that respondent's plea of guilty was not voluntarily made is erroneous and should be set aside.

The judgment of the lower Court is reversed. The writ of habeas corpus is discharged and the respondent is remanded to custody for the service of the sentence imposed upon him by the Court of General Sessions for Greenville County.

Reversed and remanded.

TAYLOR, C. J., LEWIS, BUSSEY and BRAILSFORD, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
HON. JOHN GRIMBALL, JUDGE
FIFTH JUDICIAL CIRCUIT

RAY S. BAILEY, *Respondent*,

v.

ELLIS MACDOUGALL, Director of the Department of Corrections for The State of South Carolina, *Appellant*.

Petition for Rehearing

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

An opinion of this Court in the above entitled matter was filed on the 10th day of November, 1965, reversing the judgment of the Court of Common Pleas of Richland County, and the Respondent, Ray S. Bailey, by his Attorney, Betty M. Sloan, respectfully requests a rehearing for the reasons and on the grounds hereinafter stated:

The Court's opinion is manifestly based primarily upon the facts that the Respondent was represented by counsel of his choice who served him in good faith and to the best of his ability, and that the Solicitor dealt with the attorney in presenting the agreement and not the Respondent personally, and that the attorney presented the proposition of the guilty plea.

We respectfully submit that the record is quite clear as to the following facts which should be considered by this Court.

Mr. J. G. Leatherwood, the Solicitor for the Thirteenth Judicial Circuit at the time in question, testified that at the

time of the attempted arrest by the Greenville County officers, on the night in question, they had no legal process or warrants and there was no outward violation of any law by the persons involved that could be seen by the officers. (T.R. p. 84).

That it was never definitely shown who fired the first shots, the officers or the defendants. (T.R. p. 85).

That the only witness for the State was unavailable and as stated in the Record at page 86,

> "Q. Now, with whom did you talk it over, Mr. Leatherwood?
>
> A. The Chief of Police and Tom Wofford. And we felt that if we didn't get Coren's testimony that there was some possibility of failing to get any kind of a conviction due to other legal matters which would arise during the trial. The public probably didn't understand this phase of it. But we knew it would come up whether or not there were any warrants and the right to arrest him and further that he had a great number of witnesses who would testify that at the time he was in North Carolina. It left us with very little testimony. I don't know about Singleton; I'm not positive about that. But we felt like he was going to escape us if we didn't do something and I'm satisfied that we agreed among ourselves that if we would get him to plead guilty with a recommendation of mercy it would be to the best interest of the State."

That based upon his personal evaluation of the State's case against the Defendant, the Solicitor approached the attorney for Ray Bailey with the proposition for a guilty plea. (T.R. p. 87).

That the Defendant's attorney was not told the full facts of the unavailability of the State's witness, which would

have immediately made the weakness of the State's position apparent to an attorney of Mr. Wyche's ability, and greatly influence his advice to his client as quoted in the opinion and from the record he "told them just exactly what the proposition was and what the circumstances were, and we discussed the case as a lawyer does with his client."

That lacking the full disclosure of the facts, his evaluation of his client's position was necessarily based on his own doubts about being able to successfully defend the case. (T.R. p. 15).

It is a well settled principle that the duty of the Solicitor is not only to prosecute, but to see that justice is done. On this premise is founded the broad discretionary powers delegated to the office of the Solicitor.

It was the duty of the Solicitor to advise the attorney for the Defendant of the unavailability of the State's witness, when asking him to approach his client with the proposition of the promise to recommend parole after ten years in exchange for the guilty plea.

To extract from Ray Bailey, through his attorney, a plea of guilty without full disclosure of all the facts to his attorney, and thus to him, in exchange for a written promise to do anything in mitigation of the statutory sentence without the knowledge or consent of the Court, and to the bargain for the plea, while knowing full well that the promise implied in the agreement was not binding, but that the State could not prove the guilt of Ray Bailey beyond a reasonable doubt; these acts constitute a fraud upon the Court and a travesty of justice.

A plea of guilty so obtained is not freely and understandingly made where full disclosure of the material facts, which influence the decision to plead, is not made to the Defendant or to his attorney, and where the plea is in-

duced by promises which deprive it of the character of a voluntary act, such a plea is void and should be set aside.

Respectfully submitted,

BETTY M. SLOAN
Betty M. Sloan
Attorney for Respondent

Columbia, South Carolina
November 18, 1965.
Certified True Copy

Frances H. Smith
Clerk, S. C. Supreme Court

IN THE SUPREME COURT
STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND

RAY S. BAILEY, *Respondent*,
v.
ELLIS MACDOUGALL, Director of the Department of Corrections for The State of South Carolina, *Appellant*.

Certificate of Merit

I, N. HEYWARD CLARKSON, JR., an Attorney at Law not concerned in this case, do hereby certify that, in my opinion, there is merit in the grounds upon which the foregoing Petition for a rehearing is based.

/s/ N. HEYWARD CLARKSON, JR.
N. Heyward Clarkson, Jr.

Columbia, South Carolina
November 18th, 1965.

THE SUPREME COURT OF SOUTH CAROLINA
December 14, 1965

Mrs. Betty McBride Sloan
1316 Washington Street
Columbia, South Carolina

Re: Bailey v. MacDougall, Director

Dear Mrs. Sloan:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition denied.

/s/ C. A. Taylor C. J.
/s/ Joseph R. Moss A. J.
/s/ J. Woodrow Lewis A. J.
/s/ Thos. P. Bussey A. J.
/s/ J. M. Brailsford A. J."

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
Clerk

FHS:JR
CC: The Honorable Edward B. Latimer
Assistant Attorney General
Columbia, South Carolina

Solicitor B. O. Thomason, Jr.
Greenville, South Carolina

Hon. C. G. Wyche,
Greenville, S. C.

January 13, 1936.

In Re State v. Bailey.

Dear Mr. Wyche:

This will confirm our conversation that in the event that Ray Bailey enters a plea of guilty with recommendation to mercy in the case now pending against him in the General Sessions Court for Greenville County that I will, knowing the facts of the case and the circumstances surrounding same, after the said Ray Bailey has served for a period not exceeding ten years, recommend to the Board of Pardons or Governor a pardon or parole.

Yours very truly,

J. C. Leatherwood,
Solicitor 13th Judicial Circuit.

J. E. Smith,
Chief of Police.